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IN THE

Supreme Court of the United States

October Term 1971
No. 70-352

MICHAEL LAWRENCE,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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Preliminary Statement

Petitioner seeks a writ of certiorari from this Court to the California Supreme Court to review its judgment affirming a judgment of conviction of kidnaping and assault with a deadly weapon. The opinion of the California Supreme Court, filed March 5, 1971 (*rehearing denied* March 31, 1971), is reported at 4 Cal. 3d 273 [481 P.2d 212] (1971). The Petition for Writ of Certiorari was filed on June 29, 1971.

Jurisdiction

Jurisdiction is invoked pursuant to Title 28, United States Code, section 1257(3).

Question Presented

The Petition raises the question whether this Court's holdings in the *Wade* and *Gilbert* cases, requiring the presence of counsel at lineups, rendered unlawful the showing of a photograph of a lineup to the victim for identification purposes, in the absence of petitioner or his counsel, after petitioner had consulted with his counsel on other aspects of the case.

Statement of the Case

In an information filed by the District Attorney of San Diego County on March 13, 1968, petitioner was charged in Count I with kidnaping in violation of section 207 of the California Penal Code; in Count II with assault with a deadly weapon in violation of section 245 of the California Penal Code; and in Counts III, IV and V with child stealing in violation of section 278 of the California Penal Code. A prior felony conviction of forgery in violation of section 470 of the California Penal Code was also alleged in the information. (Clerk's Transcript [hereinafter referred to as Cl. Tr.] pp. 1-2.) Petitioner pleaded not guilty and denied the prior conviction, subsequently admitting it. [Cl. Tr. pp. 33, 38.]

The following motions were made by petitioner and denied by the court: to sever various counts, to suppress evidence, to exclude the victim's out-of-court and in-court identification of petitioner, and to dismiss the information. [Cl. Tr. p. 34.]

After trial, the jury reported itself deadlocked, and a mistrial was declared by the trial court. [Cl. Tr. p. 44.]

When the cause was called for retrial, motions to suppress the identifications and to dismiss the information were denied by the trial court, which considered itself bound under the doctrine of *res judicata* by the previous judge's denial of these motions although disagreeing with the original ruling. (Reporter's Transcript [hereinafter referred to as Rep. Tr.] pp. 79-81.)

After trial by jury, petitioner was found guilty as charged in Counts I and II, the remaining counts having been dismissed during the course of the trial. [Cl. Tr. pp. 42, 57.]

Petitioner's motion for new trial was denied. [Rep. Tr. p. 430.] Probation was denied, and on September 5, 1968, petitioner was sentenced to state prison for the term prescribed by law.[1] [Cl. Tr. p. 58.]

Petitioner filed notice of appeal. [Cl. Tr. pp. 31-32.] The Court of Appeal, Fourth Appellate District, Division One, affirmed petitioner's judgment of conviction on September 22, 1969. *People v. Lawrence*, 81 Cal. Rptr. 91 (1970) (*rehearing denied* October 8, 1969). The California Supreme Court granted petitioner's petition for hearing and, in a 4-3 decision rendered March 5, 1971, affirmed petitioner's judgment of conviction. On March 31, 1971, the court denied petitioner's petition for rehearing. *People v. Lawrence*, 4 Cal. 3d 273 [481 P.2d 212] (1971).

Petitioner seeks certiorari to the California Supreme Court to review this judgment.

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[1]Execution of sentence on Count II (the assault charge) was stayed pending appeal, the stay to become permanent upon completion of the sentence on Count I (the kidnaping charge). [Cl. Tr. p. 58.]

Statement of Facts

The evidence is accurately set forth in the opinion of the California Supreme Court, and the following summary of the facts is taken from that opinion. *See People v. Lawrence*, 4 Cal. 3d 273 [481 P.2d 212] (1971).

> "At 8:30 p.m. on February 12, 1968, a man forced Mrs. Susan Ward into his car at gunpoint. About 10 minutes later she escaped, ran to a nearby house, and called the police, to whom she described her assailant. Defendant was arrested about two hours later. The following day at the police station Mrs. Ward identified defendant as her assailant from photographs taken of a simulated lineup conducted earlier that day. No witnesses were present at the time the photographs were taken nor was defendant's counsel present.
>
> "Before the trial defendant moved to suppress evidence of Mrs. Ward's identification of him. The parties stipulated that the court's decision on the legality of the photographs of the purported lineup and the admissibility of the identification testimony would be binding at trial, but that defendant would be free to attack the probative weight to be given the identifications.
>
> "At the pretrial hearing defendant submitted the preliminary hearing transcript, testified himself, and called Mrs. Ward and David Horn, his attorney, as witnesses.
>
> "Mrs. Ward testified substantially as hereinafter set forth. On the evening of Februry 12, 1968, she was walking home from a neighborhood

supermarket when she was accosted in its parking lot by a man brandishing a gun. The man stood facing her about two feet away, next to a car. He said, 'I'm sorry it has to be you,' and forced her into the car. He told her not to give him any trouble or 'he would give me this . . . and he pointed the gun and he shot it. . . .' The area around the automobile was illuminated and Mrs. Ward could see her assailant clearly. She described him as being about five feet eight to five feet ten inches tall and in his late thirties or early forties. She was able to get a good look at his full face and described him as having a medium complexion, dark curly hair at the temples, deep lines and furrows in his forehead and under his chin, and a face that was pockmarked. He was wearing a black trenchcoat, black hat, dark pants and dark pointed shoes.

"Mrs. Ward further testified that she had been requested to come to the police station on the day following the incident. She arrived there at about 9 a.m. and recounted her story to Sergeant Duncan. She was told that the police had a suspect in custody, information she also had already received the previous night. Sometime in the afternoon of the same day three color photographs of five men standing in a row were shown by Duncan to Mrs. Ward who apparently had remained at the police station throughout the entire period of time. Each photograph depicted the same five men but different poses were assumed in each of the pictures.

"At the photographic identification interview Duncan did not tell Mrs. Ward one of the men was the suspect in custody; nevertheless, she hoped her assailant was among those pictured. Duncan told her to be sure to pick out the right one, by which she understood him to mean that she was to be certain not to pick out someone who had nothing to do with the crime. His statement did not lead her to believe that one of the men was the suspect. Duncan said nothing at all during the time she was looking at the photographs and he did not give her the names of any of the persons in the photographs or any information about any of them. He made no marks on the photographs and did not point out anyone in the photographs. Mrs. Ward testified that as far as she was concerned her assailant was not necessarily to be among the men shown in the pictures.

"After looking at the photographs for two or three seconds she pointed out defendant as the person who had accosted her at gunpoint. Duncan then told her that 'three other girls had positively identified him.' He did not explain that those identifications were made with regard to offenses unrelated to the kidnaping of Mrs. Ward.

"Defendant testified that the photographs were taken after he had talked to Mr. Horn, his attorney, and that when being taken to be photographed he told his police escort: '[t]hat my counsel had advised me that it was my right to a fair trial, and that a fair trial I could not have if I participated in police lineups without his pres-

ence; and that I should tell the officers—any officers who approached me to participate in any kind of procedure to please notify him and give him an opportunity to be present and we would be more than happy to cooperate in any way, statements, photographs, or anything.' Defendant testified that the same police officer had just taken him from a meeting with Horn in the interview room.

"Horn testified that on his first visit he had advised defendant to refuse to answer any questions and to say that he did so on advice of counsel, that nothing was said on that occasion about any lineup, but that the subject was mentioned on February 14, the day following the simulated lineup and identification by Mrs. Ward." (Footnote omitted.) *Id.*, 275-77 [481 P. 2d at 213-14].

ARGUMENT

Petitioner's Right to Counsel Was Not Violated by Showing a Photograph of a Lineup to the Victim in the Absence of Petitioner's Attorney

Petitioner characterizes the issue raised in the present petition as "Whether the police may evade the defendant's request for counsel at a lineup by using a photograph of the lineup." (Pet. p. 2.)

However, the issue can more objectively be phrased as whether the right to counsel attaches where the victim's or other witness' identification is made by means of a photograph (of a lineup) rather than through personal confrontation.

The California Supreme Court held as follows with respect to petitioner's claim of error:

> "Although it appears that better police procedures could well have been employed by conducting a true lineup with counsel for defendant and the witness present (and it further appears that ample time and opportunity were available to present such a lineup) the failure to take such action is not the crucial factor in the determination of the case at bench. We are involved only with a photograph of a *simulated* lineup and we see no distinction in this respect between such identifications and identifications made from mug shots or other types of photographic displays. (See United States v. Collins (4th Cir. 1969) 416 F.2d 696; Commonwealth v. Whiting (1970) 439 Pa. 205 [266 A.2d 738, 740 fn. 3].) As indicated *infra* the overwhelming weight of authority holds

that counsel is not required at a post-arrest showing of pictures. Thus, if the police had cut up the photographs and shown the pictures of the participants individually Wade and Gilbert would have no conceivable application. We find no basis in logic to reach a different conclusion because pictures of five men standing in a line were shown." (Emphasis by the court.)

People v. Lawrence, 4 Cal. 3d 273, 277 [481 P. 2d 212, 215] (1971).

The court's opinion set forth the conflicting federal and state authority (4 Cal. 3d at 279-80 and n.3 [481 P. 2d at 216-17]) and concluded, "The overwhelming weight of authority holds that counsel's presence is not required when mug shots or other pictures of a suspect already in custody are shown to witnesses." *Id.*, 279 [489 P.2d at 216].[2]

This Court made it clear in *Simmons v. United States*, 390 U.S. 377, that the use of photographs for identification purposes is to be governed by basic due process considerations rather than by the strict rules requiring the presence of counsel at post-indictment lineup procedures. *See United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263.

The present case thus turns in part upon whether a photograph of a lineup is governed by the rules applicable to lineups or instead by the rules applicable to photographic identifications.

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[2]*See also* Annotation, *Admissibility of Evidence of Photographic Identification as Affected by Allegedly Suggestive Identification Procedures*, 39 A.L.R.3d 1000 (1971).

Respondent submits that the latter rules govern the case at bar. When photographs, even of a lineup, are shown to a witness, there is no confrontation between him and the victim. The danger of suggestiveness is largely absent: contrary to the lineup, this procedure does not involve the possible performing of physical acts or movements or the uttering of certain words by the suspect. As the California Supreme Court noted, under such circumstances a witness "observes only static poses of those pictured" and is "presented with only a collection of faces." 4 Cal. 3d at 278 [481 P.2d at 215].

Although there is always the possibility of some unfairness in this type of procedure, as in any photographic identification, the accused has available to him the basic due process grounds upon which to challenge the evidence of his identification. *Stovall v. Denno*, 388 U.S. 293.

Respondent wishes to note in the alternative, that even if the rules governing lineups apply to a photograph of a lineup, the issue remains whether the lineup rules apply at the pre-indictment, pre-information stage involved in the present case. That issue is before this Court in *Kirby v. Illinois*, No. 70-5061, *cert. granted*, 402 U.S. 995, in which the present respondent State of California has filed a brief *amicus curiae* urging its view that *Wade* and *Gilbert* are limited to *post*-indictment confrontations and that furthermore the holdings in those cases should be reconsidered.

Conclusion.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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